

The Oregon Department of Revenue Formalizes Guidance on Estimated Tax Penalties Under the Oregon Corporate Activity Tax

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In a new temporary rule, the Oregon Department of Revenue ("DOR") formalized its prior informal guidance relative to the assessment of penalties for failing to make sufficient estimated payments under Oregon's Corporate Activity Tax ("CAT"). The temporary rule provides some relief to CAT taxpayers whose businesses are adversely affected by COVID-19.

Background

Pursuant to ORS 317A.137(2), a taxpayer must make estimated quarterly CAT payments. As [discussed previously](#), ORS 317A.161(2) imposes a penalty on taxpayers who fail to make estimated payments equal to at least 80 percent of their CAT liability for any quarter during 2020.

The DOR [announced in April](#) that it would not assess penalties against a taxpayer for failure to make estimated CAT payments during 2020 if the taxpayer did not have the financial ability to make the estimated payments. The DOR further stated that it would honor a taxpayer's good faith compliance efforts if the taxpayer documents those efforts.

Unfortunately, the DOR pronouncement about penalty abatement was contained in an email blast. Consequently, many taxpayers and tax practitioners were concerned about whether such an informal announcement could be relied upon, what actually constitutes "good faith compliance efforts" and how to document the efforts.

OAR 150-317-1500 (Temporary Rule)

On June 4, 2020, the DOR filed a [Notice of Temporary Administrative Order](#) adopting new OAR 150-317-1500. The rule is a temporary rule. It is only effective from June 5, 2020 through December 1, 2020.

The temporary rule formalizes the DOR's prior informal email guidance. It provides that the DOR will not assess the penalty imposed under ORS 317A.161(2) on a taxpayer who fails to pay, underpays or underreports its estimated CAT liability for any quarter in 2020 if the taxpayer can demonstrate that it made a good faith effort to estimate and pay such liability.

The temporary rule also provides guidance on what constitutes a "good faith effort" to comply with quarterly CAT payment obligations. For all tax years, including 2020, a taxpayer is considered to have made a good faith effort to comply with the CAT estimated quarterly payment requirements if it made a "reasonable estimate" of each quarterly installment "based on information available to the taxpayer" when the installment was due. So, the focus is on the facts and circumstances existing at the point in time when a payment is due.

For the 2020 tax year only, the rule further provides that a taxpayer can demonstrate good faith if any one of the following three circumstances is satisfied:

- The taxpayer cannot reasonably determine, at the time a quarterly installment is due, whether the taxpayer will have CAT liability for the tax year, due to the negative impact of COVID-19, after taking into consideration the exclusions and subtractions provided in ORS chapter 317A;
- The taxpayer did not have sufficient funds to pay the required installment for the quarter, due to the impact of the COVID-19 pandemic on the taxpayer's business; or
- The taxpayer cannot reasonably calculate the required quarterly installment or annual tax liability due to the impact of the COVID-19 pandemic on the taxpayer's business.

The rule additionally provides that the DOR may require that a taxpayer produce documentary proof supporting the taxpayer's assertion that it acted in good faith. Taxpayers are required to retain documentation showing their good faith efforts, but they need not submit it to the DOR unless it so requests.

The question remaining on the minds of most taxpayers and tax practitioners is: What constitutes documentary proof of good faith? The rule is silent on that question. We suspect taxpayers will want to maintain a CAT file containing at least the following:

- Bank records;
- Financial statements (the then-current monthly balance sheets, monthly income/expense statements, and daily deposit records, as well as comparable documents for the same period of the prior year(s));
- Annual budget;
- Written documentation of lost or deferred business;
- Written contemporaneous notes about sales made to customers that may be exempt from the CAT but for which documentation or verification is sought but not yet received; and
- Revenue projections and revenue results year to date.

Conclusion

The temporary rule provides some welcome relief to taxpayers affected by COVID-19 and unsure about their CAT liability and quarterly payment obligations. The DOR's decision to formalize its prior guidance is welcome news for tax practitioners and taxpayers. Nevertheless, the standard enunciated by the DOR in its rule for evidence of "good faith" efforts is not crystal clear.

If taxpayers have been adversely impacted by COVID-19 and believe that they can meet any of the circumstances discussed above, they need to document them, including the items set forth above, in order to evidence any decline in business, any indications of future business declines (e.g., notices from customers that they will not be able to complete future projects or will have to cancel or postpone pending orders), market or industry forecasts, and any other matters negatively impacting finances or ongoing operations. Keep in mind that taxpayers may be called upon to present such evidence to the DOR at a later date.

We will continue to update you on new CAT guidance as it is issued.

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